Supreme Court, U.S.
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CASE NO. _____

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

IN RE: CLARENCE O. GESCHKE
and IRENE M. GESCHKE

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CLARENCE O. GESCHKE
and IRENE M. GESCHKE,
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QUESTIONS PRESENTED FOR REVIEW

(1) Whether, in a fourteen-year-old case that the district court judge has never brought to trial, the judge's actions have departed from the accepted and usual course of judicial proceedings by denying the petitioners' rights under the United States Constiution and by not acting in accordance with federal rules and case law.

(2) Whether the district court judge's actions indicate that he harbors bias and prejudice against the petitioners.

(3) Whether the Court of Appeals for the Seventh Circuit erred in denying the petitioners' *Petition For Writ Of Mandamus* to the district court judge to recuse himself from the case, and thereby sanctioned the judge's actions and his bias, prejudice and partiality.

PARTIES TO PROCEEDING IN COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The parties to the petition of Clarence O. Geschke and Irene M. Geschke to the United States Court of Appeals for the Seventh Circuit for a writ of mandamus (appeal no. 93-3289) were: JUDGE JOHN F. GRADY, United States District Court, Northern District of Illinois, Eastern Division; LASALLE NATIONAL BANCORP, INC., defendant; LASALLE NATIONAL BANK, defendant; UNION REALTY MORTGAGE COMPANY, INC., defendant; CLDC MANAGEMENT CORPORATION, defendant; RUSSELL R. CUSTER, defendant; DENNIS KAPLAN, defendant; JAMES CAMPION, as Trustee under Trust Deed No. 766087, defendant.

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REPORT OF OPINION

No opinion was delivered in the Geschkes' appeal no. 93-3289 to the Court of Appeals for the Seventh Circuit to issue a writ of mandamus to United States District Court Judge ohn F. Grady to recuse himself from a case in which the Geschkes are the plaintiffs. Judge Grady's Order denying the Geschkes' motion for him to recuse himself contains a short three-page opinion and is included in the appendix to this petition.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The United States Court of Appeals for the Seventh Circuit on November 12, 1993 issued an Order denying the Geschkes' *Petition For Writ Of Mandamus* for Judge Grady's recusal (appeal no. 93-3289). The court of appeals issued no opinion with its order.

The court of appeals on December 3, 1993 issued an Order denying the Geschkes' *Motion For Reconsideration Of Petition For Writ Of Mandamus*. The court issued no opinion with its order.

The Geschkes believe that 28 U.S.C. § 1254 "Courts of appeals; certiorari, certified questions" confers on the Supreme Court of the United States jurisdiction to review the judgment in question by writ of certiorari. That statutory provision states in part:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN CASE PRESENTED FOR REVIEW

This petition for writ of certiorari involves two constitutional provisions: Amendment V (1791) and Amendment VII (1791). (for pertinent text see petition appendix pp. 1-2)

This petition for certiorari involves three federal statutes: 28 U.S.C. § 144 "Bias or prejudice of judge"; 28 U.S.C. § 455 "Disqualification of justice, judge, or magistrate"; 28 U.S.C. § 1651 "Writs." (for pertinent text see petition appendix pp. 2-4)

This petition involves Federal Civil Procedure Rule 50(a) "Judgment as a Matter of Law." (for pertinent text see petition appendix pp. 4-5)

This petition involves two federal rules of evidence: Rule 602 "Lack of Personal Knowledge" and Rule 611(b)

"Mode and Order of Interrogation and Presentation -- Scope of cross-examination." (for pertinent text see petition appendix pp. 4-7)

STATEMENT OF THE CASE

Petitioners Clarence O. Geschke and Irene M. Geschke

The petitioners, Clarence O. Geschke and Irene M. Geschke, are, respectively, 71 and 69 years of age. The Geschkes are the plaintiffs in a civil case, no. 79 B 40657, pending before United States District Court Judge John F. Grady in the Seventh Circuit, Northern District of Illinois, Eastern Division. The Geschkes have represented themselves in the federal district court since July 1988. [*Petition For Writ Of Mandamus* (hereinafter, "Pet.") pg. 5]

Basis For Federal Jurisdiction In Court Of First Instance

Case 79 B 40657 is a civil action that was in bankruptcy court from 1979 to 1985; a civil case number has never been assigned to the case. The case, now into its fifteenth year, has never gone to trial. Judge Grady has presided over the case since April 1983. (Pet. pp. 1-2)

The jurisdiction of the United States District Court for the Northern District of Illinois, Eastern Division is based on counts in the Geschkes' case alleging violations of 18 U.S.C. §§ 1961 *et seq*, the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The district court has pendent jurisdiction of claims brought under state law. The RICO and state law claims are so intertwined that the district court determined that exercise of pendent

jurisdiction was appropriate. Venue is appropriate in the Northern District of Illinois because the acts of wrongdoing asserted in the Geschkes' Complaint occurred in that district.

The Geschkes' Complaint includes counts alleging fraudulent misrepresentation, RICO violations, breach of fiduciary duty, negligent misrepresentation, negligent supervision, breach of contract, and breach of convenant of good faith. The counts all relate to construction loans made to the Geschkes by a wholly-owned subsidiary of the defendant bank holding company, LaSalle National Bancorp, Inc. (hereinafter, "LaSalle Bancorp") (Pet. pg. 5)

Course Of Proceedings Up To Filing Of Motion For Recusal

In December 1987, Judge Grady for the first time scheduled a date, May 5, 1988, for the start of the trial of this

case. Since then, the judge has vacated the scheduled trial date nine times.

The judge permitted the Geschkes' legal counsel to withdraw from the case, over the Geschkes' objections, at a hearing on July 13, 1988. The Geschkes' legal counsel had been representing them on a contingency basis. The Geschkes were unable to retain new legal counsel.

The Geschkes in December 1989 obtained the judge's leave to file a fourth amended complaint that added as a defendant LaSalle Bancorp. (Pet. pg. 6)

LaSalle Bancorp filed on July 5, 1990 a motion for summary judgment. On October 4, 1990, five days before trial of the case was scheduled to begin, the judge entered a summary judgment in favor of LaSalle Bancorp. The judge, over the Geschkes' objections, certified the summary judgment for an immediate appeal (no. 91-1944). A three-judge

panel of the United States Court of Appeals for the Seventh Circuit in March 1992 unanimously vacated that summary judgment and remanded the case to Judge Grady. A seventeen-page opinion was attached to the panel's Order. The court of appeals found that the summary judgment was "inappropriate" and that the judge had abused his discretion in his handling of the issue of discovery of LaSalle Bancorp. (Pet. pp. 6-8)

At a hearing on June 3, 1992, the judge ordered LaSalle Bancorp to produce by July 1, 1992 documents the Geschkes had requested in their June 1, 1992 Federal Civil Procedure Rule 37(a) motion to compel. (Pet. pg. 8)

LaSalle Bancorp produced on July 20, 1992 eighty-seven boxes that it said contained more than 136,000 pages of documents that the Geschkes had requested. (LaSalle Bancorp referred to

each piece of paper as a "document" and that practice is followed here.) The Geschkes and their accountant spent forty hours looking through fifty boxes that LaSalle Bancorp said contained documents sought in three key requests for documents, out of the total of fifty-three such requests. (Pet. pp. 8-9)

The Geschkes on July 23, 1992 filed a Fed. Civ. Proc. Rule 37(b) motion to sanction LaSalle Bancorp for its failure to comply with the court's June 3, 1992 order to produce documents listed in the Geschkes' motion to compel. LaSalle Bancorp filed on August 7, 1992 its response to the Geschkes' Rule 37(b) motion. (Pet. pg. 9)

At the hearing on August 12, 1992, the Geschkes asked whether withdrawing their Rule 37(a) motion to compel production would enable the trial to

begin as scheduled on November 2, 1992. The judge in response to the Geschkes' inquiry stated that he would not permit them to withdraw their motion. (Pet. pg. 9)

The judge at the October 15, 1992 hearing issued an oral ruling denying the Geschkes' Rule 37(b) motion as "premature" because they had not inspected all the documents in all of the 87 boxes LaSalle Bancorp had produced. The judge stated that the case would not go to trial until the Geschkes had inspected *all* the boxes of documents produced by LaSalle Bancorp and had informed him in detail as to what requested documents LaSalle Bancorp had failed to produce. (Pet. pp. 9-10)

At the October 21, 1992 hearing, the judge *ordered* the Geschkes to inspect the contents of all of the boxes of documents LaSalle Bancorp had

produced for inspection (an eighty-eighth box was produced on November 2, 1992).

The judge also at the October 21, 1992 hearing struck the November 2, 1992 date for the start of the trial of this case. The judge's minute order states that "the case will be reset for trial *when the Court is satisfied* that plaintiffs have received all documents to which they are entitled." [emphasis added] (Pet. pg. 10)

The judge stated that if the Geschkes concluded from their inspection that LaSalle Bancorp did not produce all the documents they had requested, they should present a motion to compel "perhaps accompanied by a motion for sanctions." The judge stated, "I want it documented as to what they [i.e., LaSalle Bancorp] did not produce." (Pet. pg. 11)

In compliance with the judge's order, the Geschkes on November 2, 1992 began to search through the contents of all eighty-eight boxes produced by LaSalle Bancorp for documents they had specifically requested. The Geschkes also held a Local Rule 12(k) conference with LaSalle Bancorp's legal counsel. Between November 2 and December 29, 1992, they and their accountant spent a total of nearly 229 hours inspecting and recording the documents in the eighty-eight boxes. They entered on preprinted forms the more than 136,000 documents' Bates numbers, dates, and descriptions, and other pertinent information. This data was compiled and set forth in an Exhibit A attached to *Plaintiffs' Motion For Rule 37(b) Sanctions Against LaSalle National Bancorp, And Motion To Set Firm Trial Date*, which the Geschkes filed on March 1, 1993. (Pet. pp. 11-12)

The motion reported specifically and in detail LaSalle Bancorp's failure to produce, as ordered by the judge, documents the Geschkes sought in each of the fifty-three document requests in their Rule 37(a) motion to compel production of documents. The Rule 37(b) motion also showed that LaSalle Bancorp did not produce the documents in the manner required by Fed. Civ. Proc. Rule 34(a), that LaSalle Bancorp had obstructed and delayed production of documents for the Geschkes to inspect, and that it had misrepresented the appropriateness of Local Rule 12(k) conferences and its willingness to resolve disputes. (Pet. pg. 12)

LaSalle Bancorp filed on March 9, 1993 a *Motion To Deny With Prejudice Plaintiffs' Renewed Motion For Sanctions*. LaSalle Bancorp has acknowledged that it never responded to the

Geschkes' Rule 37(b) motion and to the facts and arguments it contained. (Pet. pp. 13-14)

Instead of ruling on the Geschkes' motion on the basis of information in documents filed with the district court and thereby placed before him, the judge held three "evidentiary hearings" on June 10 and 28, 1993, and July 1, 1993. The hearings concerned the issue of whether LaSalle Bancorp had produced documents as the judge had ordered on June 3, 1992. The Geschkes objected to the manner in which the hearings were planned and conducted by the judge. The Geschkes argued that the hearings were improper, unfair and favored LaSalle Bancorp. At the conclusion of the last hearing, the judge ruled that LaSalle Bancorp had fully complied with his order to produce documents, and denied the Geschkes' Rule 37(b) motion. (Pet.

pp. 14-38)

Filing Of Motion For Recusal And Petition For Writ Of Mandamus For Judge's Recusal

The judge's failure to bring the Geschkes' case to trial and his actions since March 1992 led the Geschkes in July 1993 to investigate whether he could be removed from their case. The Geschkes' research led them to 28 U.S.C. §§ 144, 455(a) and 455(b)(1) for recusal of judges. The Geschkes also researched Seventh Circuit case law concerning recusal. They then prepared a *Motion For Recusal*, to which they attached their signed and notarized affidavit. [Appendix to *Petition For Writ Of Mandamus* (hereinafter, "App.") pp. 8-9]

The Geschkes filed their motion for recusal on August 2, 1993. Defendants LaSalle Bancorp and Union Realty Mortgage Company. Inc. (hereinafter "Union"), its wholly-owned subsidiary,

filed on August 23, 1993 a joint objection to the Geschkes' motion for recusal. The Geschkes filed on September 7, 1993 their reply to the defendants' objection. The judge on September 9, 1993 issued his Order denying the motion for recusal. (see attached Appendix pp. 8-12) The Geschkes received that Order, by mail, on September 14, 1993. (Pet. pp. 1, 3)

The Geschkes filed with the Court of Appeals for the Seventh Circuit on September 24, 1993 a *Petition For Writ Of Mandamus* to Judge Grady to recuse himself from the case. (appeal no. 93-3289) LaSalle Bancorp and Union filed a joint response to the petition on October 12, 1993. [see Geschkes' *Motion For Reconsideration Of Petition For Writ Of Mandamus* filed November 12, 1993 (hereinafter, "Mot.") pg. 1]

The Court of appeals on November 8,

1993 issued a two-line Order denying the Geschkes' petition for writ of mandamus. The court issued no opinion with the Order. (see attached Appendix pp. 13-15)

The Geschkes filed on November 12, 1993 a *Motion For Reconsideration Of Petition For Writ Of Mandamus*. The Geschkes filed the motion for reconsideration because LaSalle Bancorp and Union in their response had made serious and significant misrepresentations of essential facts, had made arguments and offered conclusions based on those misrepresentations, and had not addressed critical arguments and facts presented in the petition. (Mot. pp. 2-3)

Without directing the parties in the appeal to file a response to the motion for reconsideration, the court of appeals on December 3, 1993 issued a

two-line Order denying the motion. The court issued no opinion with the Order. (see attached Appendix pg. 18)

The *Motion for Recusal* and *Petition For Writ Of Mandamus* both presented facts and arguments to show that the district court judge has manifested bias and prejudice by disregarding his duty to try the Geschkes' case, by his *ex parte* communication with the defendants' legal counsel, by implementing unfair and improper discovery procedures, and by not adhering to federal civil procedure rules and the law of the case.

Age Of Case And Fact That It Has Never Gone To Trial

The Geschkes have repeatedly, in their filings with the district court, pointed out how the judge's failure to take their case to trial has harmed the case and has impaired their ability to try it, but has worked to the

defendants' advantage. (Pet. pg. 60)

Judge Grady in his minute order of November 24, 1993 vacated the date, December 6, 1993, on which trial of the Geschkes' case had been scheduled to begin. (see attached Appendix pg. 16-17)

Ex-Parte Communication Involving Judge And Defendants

The judge on September 23, 1992 scheduled a hearing for October 15, 1992 to confer with the parties about trial exhibits to whose authenticity the parties had not stipulated. But at the October 15, 1992 hearing, the judge instead heard oral argument on the Geschkes' Rule 37(b) motion to sanction LaSalle Bancorp, and then ruled on the motion. (Pet. pp. 56-57; App. pp. 45-46)

The Geschkes had no prior notice that the judge would change the purpose of the hearing, and were therefore unprepared to present oral argument.

LaSalle Bancorp, however, apparently did have prior notice of the change in plans. Ten lawyers and paralegals representing LaSalle Bancorp arrived in court on October 15, with four boxes in tow that LaSalle Bancorp counsel, Stephen B. Diamond said contained documents that had been produced for the Geschkes. Diamond used those boxes as props to support his well-rehearsed arguments at the hearing. (Pet. pg. 57; App. pp. 47-47, 136-137)

Neither Diamond in his reply to the motion for recusal nor the judge in his Order denying the motion chose to or were able to address and explain away the facts the motion presents that show *ex parte* communication. (Pet. pg. 57; Aff. pp. 38-39)

Procedures Judge Implemented To Address Issue of LaSalle Bancorp's Production Of Documents

The judge on April 14, 1993 issued a minute order setting a status conference for May 5, 1993. A five-page Order was attached to the minute order. The judge's order made no mention of ruling on the Rule 37(b) motion the Geschkes had filed on March 1, 1993 to sanction LaSalle Bancorp for its failure to comply with the judge's order to produce documents. Instead, the judge proposed in his order to make "factual determinations" about whether LaSalle Bancorp had complied with his order, at the June 3, 1992 hearing, to produce the documents requested in the Geschkes' June 1, 1992 Rule 37(a) motion to compel production. (Pet. pg. 14)

Nothing existed in the record, at the time that the judge issued his April 14, 1993 order, to give him notice that

LaSalle Bancorp disputed any of the facts and arguments set forth in the Geschkes' Rule 37(b) motion to show LaSalle Bancorp's failure to comply with his order to produce. The judge's order did not cite any response by LaSalle Bancorp to the Rule 37(b) motion. (Pet. pg. 14)

The judge proposed to make "factual determinations" by selecting a "representative sample" of the more than 136,000 documents that LaSalle Bancorp had produced for the Geschkes' inspection, and then extrapolating his findings to the rest of the documents LaSalle Bancorp produced. (Pet. pp. 14-15; App. pp. 29-30)]

The judge denied without comment the Geschkes' motion to vacate his order to hold an evidentiary hearing on June 10, 1993 and their motion to default LaSalle Bancorp for its failure to file

a response to their March 1, 1993 Rule 37(b) motion to sanction. The judge also denied without comment the Geschkes' motion to establish what procedures would be followed at the evidentiary hearing. In that motion, the Geschkes ask the judge to order LaSalle Bancorp to disclose what witnesses it would call to testify, the matters to which the witnesses would testify, and the documents on which the witnesses would rely to support their testimony. (Pet. pp. 15-18)

LaSalle Bancorp also did not disclose to the Geschkes prior to the hearings -- in lieu of filing a written response to their Rule 37(b) motion -- what counter-arguments it would advance to prove that it did produce the documents requested in the Geschkes' June 1, 1992 Rule 37(a) motion to compel. (Pet. pg. 20; App. pp. 37-38)

The judge held a total of three evidentiary hearings. At the hearings, Irene Geschke again objected to LaSalle Bancorp's failure to file any response to the Geschkes' Rule 37(b) motion, and restated her continuing objection and opposition to the evidentiary hearings. (Pet. pg. 21)

The judge permitted LaSalle Bancorp's witnesses to give opinions and to draw conclusions, contrary to his previous statements that he wanted to hear only facts and not opinion. Throughout the hearings, the judge permitted counsel for LaSalle Bancorp to ask leading questions of its witnesses. (Pet. pp. 18-19)

The judge permitted LaSalle Bancorp counsel Diamond to frequently inject his unsworn testimony into the evidentiary hearings, in place of testimony being given by LaSalle Bancorp's in-house

lawyers and its accountants, although Diamond had no personal knowledge of the matters to which he testified. (Pet. pg. 19)

The judge expected Irene Geschke to immediately cross-examine LaSalle Bancorp's witnesses after they had testified. Irene Geschke, to protect the Geschkes' interests, attempted to cross-examine LaSalle Bancorp's witnesses as best she could. (Pet. pp. 20-21)

The judge at the June 10, 1993 evidentiary hearing invited Irene Geschke to testify about LaSalle Bancorp's production of documents. However, he soon began questioning Irene Geschke about her testimony and then, instead of questioning her about matters of which she had personal knowledge, began asking for immediate responses to testimony offered earlier in the hearing

by LaSalle Bancorp's witnesses. (Pet. pg. 21)

The judge would not permit Irene Geschke, in giving her testimony, to refer back to the Geschkes' Rule 37(b) motion. He required her to use only her recall of the facts in giving her testimony. (Pet. pp. 21-22; App. pp. 38-41)

On the other hand, the judge made no objection when at the June 10, 1993 hearing, LaSalle Bancorp counsel Diamond repeatedly directed LaSalle Bancorp's witnesses' attention to specific paragraphs in the motion. (Pet. pg. 22)

The judge at the June 28, 1993 hearing stated that two more evidentiary hearings would be required. However, with no advance notice to the Geschkes, the judge at the July 1, 1993 hearing stated that he would hear oral argument concerning LaSalle Bancorp's production

of documents. Irene Geschke stated that she did not know that the judge would hear oral argument that day, and asked if the judge would set another hearing for oral argument, a request he refused. (Pet. pp. 24-26)

LaSalle Bancorp counsel Diamond, however, came well prepared to deliver his oral argument. After Diamond had concluded his argument, the judge delivered an oral ruling denying the Geschkes' Rule 37(b) motion. (Pet. pp. 26-38)

In denying the Geschkes' Rule 37(b) motion, the judge stated,

> "One must consider the implications of a contrary finding. It would mean that several members of the bar have perjured themselves. It would mean that two certified public accountants have perjured themselves in this hearing. And while that is not

impossible, it is certainly not an everyday occurrence."

(Pet. pg. 26)

In his ruling, the judge stated that, like the Geschkes,

"I, too, am surprised that accountants would not retain their computations and work papers showing how they arrived at particular entries on the tax return for a longer period of time than they were apparently retained here according to their testimony. On the other hand, the testimony today that seven years is the usual limit for retention appears reasonable, and that would certainly account for destruction of a substantial quantity of paper."

(Pet. pg. 27)

Later in his ruling, addressing LaSalle Bancorp's failure to retain its financial statements, the judge stated:

"As in the case of the tax returns, I am somewhat surprised that there is not more backup material that is still in existence. . . We live in a society that is choking itself on paper, and there is a natural tendency to rid ourselves of anything that is not likely to be necessary. So it is understandable that people would not retain warehouses full of old documents just for the convenience of possible prospective litigants."

(Pet. pp. 30-31)

However, the judge was well aware that the Geschkes' case had been filed in 1979, and that they therefore were actual litigants rather than "prospective litigants" at the time that LaSalle Bancorp would have rid itself of documents crucial to the Geschkes' case. (Pet. pg. 31)

The judge's comments run directly

counter to the Seventh Circuit's March 9, 1992 Order reversing the summary judgment in favor of LaSalle Bancorp, wherein the Court states that "Union was aware of the Geschkes' lawsuit before its operations ceased. Thus Union and/or [LaSalle] Bancorp should have taken steps to insure the preservation of all pertinent documentation." (Pet. pp. 27, 31)

Judge Orders Trial Of "*Alter Ego* Issue" Separately And Ahead Of Remaining Issues

At the September 23, 1992 hearing, the judge invited LaSalle Bancorp counsel Diamond to file a motion to try the "*alter ego* issue" (i.e., whether defendant Union is the *alter ego* of its parent corporation, LaSalle Bancorp) separately and ahead of the other issues in the Geschkes complaint, "and I could rule on that, so that LaSalle Bank [actually, LaSalle Bancorp] is either in

or out before we proceed with the rest of the trial." (Pet. pg. 38; App. pg. 48)

The Geschkes opposed separating off the *alter ego* issue. They pointed out that the trial of their case was set to begin in only five weeks, on November 2, 1992, and that the date had been set back on April 15, 1992. (Pet. pg. 38)

LaSalle Bancorp counsel filed a *Motion Of LaSalle National Bancorp For Bifurcated Trial* and an attached *Memorandum In Support* of that motion, both dated September 30, 1992. The Geschkes filed on October 7, 1992 a response to that motion. They filed on October 13, 1992 a supplement to their response, and on October 15, 1992 an answer to LaSalle Bancorp's reply to their response. (Pet. pg. 38)

At the hearing on October 15, 1992, the judge stated that he would bifurcate

the trial of this case, and would try first the *alter ego* issue involving LaSalle Bancorp. (Pet. pg. 39)

Neither at the hearing on October 15, 1992 nor in the minute order issued on that same date did the judge address the specific objections to bifurcation of the trial raised in the Geschkes' response and in their supplement to their response to LaSalle Bancorp's motion for bifurcation. (Pet. pg. 39)

ARGUMENT

Accepted And Usual Course Of Judicial Proceedings Prohibit Judicial Bias, Prejudice And Partiality

It is accepted and usual practice in judicial proceedings for judges to be free of bias, prejudice and partiality with respect to litigants and matters at issue. The disqualification of judges in the federal courts system who exhibit bias, prejudice and partiality is

provided for in 28 U.S.C. §§ 144 and 455.

Geschkes' Motion For Recusal Presented Four Grounds Arguing For Judge's Withdrawal From Case

The court of appeals, by denying the Geschkes' *Petition For Writ Of Mandamus* for Judge Grady's recusal, has sanctioned the judge's departure from accepted and usual practice.

The judge has exhibited bias and prejudice against the Geschkes and their cause, and partiality for the defendants, by acting in ways that were a further departure from accepted and usual practice. The judge's actions denied the Geschkes their rights to due process, as provided for in the Fifth Amendment to the Constitution of the United States, and to a jury trial, as provided for in the Seventh Amendment to the Constitution.

The Geschkes in their *Motion For*

Recusal presented in detail facts and arguments supporting four grounds for the judge's disqualification from the case. The Geschkes filed that motion because there was no point in proceeding further in the case until they had attempted to obtain the recusal of the biased and prejudiced judge presiding over it.

Judge Has Disregarded His Obligation To Take Case To Trial

The judge's bias and prejudice against the Geschkes and their cause, and his partiality for LaSalle Bancorp and the other defendants, have found expression in part through his failure and, in effect, refusal to take the Geschkes' case 79 B 40657 to trial. (Pet. pg. 65)

The Geschkes have been unable to discover in the federal civil procedure rules or in case law any limitation on

time allowed to take a case to trial. However, the *Preliminary Report* issued by the Civil Justice Reform Act Advisory Group of the United States District Court for the Northern District of Illinois observes (*Report* pp. 21-22, 29):

> "The CJRA seems to contemplate eighteen months as the maximum reasonable time within which a case should be brought to trial. . . . At some point in every case, all will agree that the elapsed time has become unreasonable. But except in the more extreme cases, the point eludes prediction or agreement. . . . It may also be that in some absolute sense, lawyers believe that two years is as long as almost any case should take."

(Pet. pg. 64)

Case 79 B 40657, now in its fifteenth year without having been

tried, is one of those "extreme cases." However, neither the judge nor defendants' counsel acknowledge that the delay in bringing the case to trial has become unreasonable. (Pet. pg. 64)

The judge's refusal to take the Geschkes' case to trial works to the advantage of LaSalle Bancorp and the other defendants because it has allowed the case to deteriorate over time. The Geschkes have repeatedly reminded the judge that, as years pass without the case being tried, the parties age, memories fade, and witnesses die, as have one principal defendant and one principal witness. (Pet. pp. 60-61)

The Geschkes have done everything they could to move their case to trial. Counsel's claim that the Geschkes have prevented the case from going to trial despite the judge's best efforts is simply preposterous, because the judge,

not the Geschkes, controls his courtroom. The defendants have offered no explanation of why the Geschkes would act to delay trial of their case when that delay so clearly harms their interests and helps the defendants. (Mot. pp. 9-10, 21-22)

The judge had a clear obligation to exercise his jurisdiction and "expeditiously consider and resolve" the Geschkes' claims in their Complaint by taking their case to trial. *Will v. Calvert Fire Insurance Co.*, 57 L.Ed. 504, 515 (1978).

The Geschkes will never get to appeal their case because the judge has effectively refused to try the case. The judge's refusal defeats ultimate exercise by the court of appeals of its appellate jurisdiction. *Will v. Calvert, supra,* at 511; *LaBuy v. Howes Leather Co.* 352 U.S. 249, 254 (1957).

The judge's failure to try the Geschkes' case has amounted to "a refusal on his part, as a judge, to try the causes in due course . . . " *LaBuy v. Howes, supra* at 254. The judge's refusal to take the case to trial presents a constitutional issue because it has denied the Geschkes their right, under the Fifth Amendment to the Constitution, to due process, and their right, under the Seventh Amendment, to a jury trial. (The Geschkes in February 1980 had filed a jury trial demand.) (Pet. pg. 65)

The defendants, in their responses, made much of the fact that the judge had set yet another trial date, the ninth one, for December 6, 1993. However, that fact in itself gave the Geschkes no reason to refrain from pressing for the judge's recusal. That trial date could not be relied on given the judge's

history of vacating trial dates on the eve of trial. And the judge's previous actions gave the Geschkes no reason to believe that any trial he conducted in the case would be a fair one. (Pet. pg. 61; Mot. pp. 22-23)

Judge Has Engaged In Ex-Parte Communication With Defendants

The circumstances attending the hearing the judge held on October 15, 1992 show *ex parte* communication between the judge and legal counsel jointly representing defendants LaSalle Bancorp, LaSalle National Bank and Union. [see preceding Statement Of The Case ("Stmt. Case") pp. 19-20]

The defendants argue that the Geschkes have failed to provide factual support to show *ex parte* communication between their counsel and the judge. The defendants, in their response, and the judge in his Order, asserted that

the Geschkes' argument amounts to nothing more than "inference" and "surmise." Those assertions ignore the many specific facts presented in the Geschkes' petition and motion for recusal. (Pet. pg. 56; Mot. pp. 15-17)

Instead of addressing the facts the Geschkes present in their petition and motion for recusal, the defendants attempted a diversion by arguing that LaSalle Bancorp's counsel "appeared in the district court on October 15, 1992 prepared to address the Geschkes' Rule 37(b) motion because it was the principal unresolved matter in the case." The defendants' argument, which is untrue, is also beside the point, because it does not address or mitigate the facts concerning the circumstances of the October 15, 1992 hearing. (Mot. pp. 17-18)

LaSalle Bancorp and Union's legal

counsel attached, to their response to the Geschkes' motion for recusal, affidavits in support of their denial of their alleged *ex parte* communication with the judge. Counsel in their affidavits merely deny that *ex parte* communication took place but do not address the specific facts set forth in the Geschkes' motion for recusal and petition for writ of mandamus. The affidavits present "mere conclusions" without any supporting facts let alone facts stated "with particularity." *United States v. Balistrieri*, 779 F.2d 1191, 1199 (7th Cir. 1985) (Mot. pg. 18)

And the affidavits are not credible given counsel's documented record of misrepresentation to the court of appeals. (see court of appeals' March 9, 1992 Order pp. 5-11) The affidavits are self-serving and do not disprove the *ex parte* communication. (see *United States*

v. Barnes, 909 F.2d 1059, 1063, 1071 (7th Cir. 1990) (Mot. pg. 18)

The defendants do not address the case law the Geschkes present. (Pet. pp. 57-58; Mot. pg. 19)

The judge had a duty to show fairness to litigants in the cases over which he presides. *Ex parte* communication between the judge and counsel for the defendants is not compatible with the fair and orderly administration of justice. The *ex parte* communication that has taken place in the Geschkes' case has left them at an obviously unfair, and continuing (see following subsection), disadvantage with respect to their adversaries. Still more serious is the judge's denial, through the *ex parte* communication, of the Geschkes' constitutionally protected right to due process. (Pet. pg. 65)

Ex parte communication is in itself

serious enough to require recusal under 28 U.S.C. §§ 144, 455(a) and 455(b)(1). *United States v. Furst*, 886 F.2d 558, 561 (3rd Cir. 1989) (Pet. pp. 57-58)

The *ex parte* communication also signals the judge's bias and prejudice against the Geschkes and their cause, and his partiality for LaSalle Bancorp. The apparent existence of *ex parte* communication in this case argues strongly for the judge's recusal. (Pet. pg. 58)

Judge Adopted Unfair And Improper Procedures To Address Issue Of LaSalle Bancorp's Production Of Documents

The judge's decision to hold evidentiary hearings was improper and unfair. The way in which the judge conducted those hearings compounded the unfairness. The evidentiary hearings were an expression of the judge's bias and prejudice against the Geschkes and their cause, and his partiality for

LaSalle Bancorp. (Pet. pg. 49) (see Stmt. Case pp. 21-30)

The Geschkes' Rule 37(b) motion fully set forth their facts and arguments that LaSalle Bancorp had not produced for inspection the documents that were the subject of the Geschkes' motion to compel, which the judge had granted. (Pet. pg. 16)

LaSalle Bancorp had been well aware of the Geschkes' arguments since March 1, 1993, when it had been served with their Rule 37(b) motion. LaSalle Bancorp thus had more than three months prior to the evidentiary hearings to marshal its defenses and counter-arguments against the Geschkes' motion, prepare its witnesses to testify at the evidentiary hearing, and prepare questions to ask of Irene Geschke at the hearing. (Pet. pg. 16)

LaSalle Bancorp made no response,

written or otherwise, to the Geschkes' Rule 37(b) motion until it made its oral response at the evidentiary hearings beginning in June 1993. (Pet. pp. 16, 49-50)

The judge decided to hold evidentiary hearings, but declined to require LaSalle Bancorp to disclose to the Geschkes, in advance of the hearings, what witnesses would testify on its behalf, the matters to which its witnessses would testify, and the documents on which the witnesses would rely to support their testimony. (Pet. pp. 50-51; Mot. pg. 13)

The judge thus ensured that LaSalle Bancorp would have a crucial advantage over the Geschkes because it knew in advance their facts and arguments concerning its failure to produce documents.

The Geschkes, on the other hand,

remained completely in the dark as to what LaSalle Bancorp's defenses and counter-arguments would be at the upcoming evidentiary hearings. They could not prepare questions for their cross-examination of LaSalle Bancorp's witnesses at the hearing, and could not anticipate what questions they would be asked. (Pet. pp. 16, 51)

The manner in which the judge conducted the evidentiary hearings was obviously unfair and ensured that the Geschkes would remain at a clear disadvantage with respect to LaSalle Bancorp's counsel. The judge did not comply with Federal Evidence Rule 611(b), "Scope of cross-examination," and Federal Evidence Rule 602, "Lack of Personal Knowledge." (Pet. pp. 52-56)

The judge's reasoning in his oral ruling on July 1, 1993 shows that he based his ruling not on the merits of

the Geschkes' arguments but on clearly extrajudicial factors. The judge's comments and the attitude they disclose further reveal his bias in favor of LaSalle Bancorp. (Pet. pp. 54-55)

The judge's comments also reveal his failure to adhere to the law of the case as established by the Court of Appeals for the Seventh Circuit.

The judge had a duty of fairness. The conditions under which the judge held the evidentiary hearings, and the manner in which they were held, were unfair to the degree that they denied the Geschkes their constitutional right to due process under law. (Mot. pg. 14)

Judge Abused His Discretion By Not Complying With Federal Rules And Law Of The Case

The judge's order to try the "*alter ego* issue" separately and ahead of the other issues in the Geschkes' case goes against the federal civil procedure

rules and the law of the case as set forth by the Seventh Circuit. The judge's order expresses his bias and prejudice against the Geschkes and their cause, and his partiality for LaSalle Bancorp. (see Stmt. Case pp. 30-32)

The judge has denied that LaSalle Bancorp is liable on any other basis than that its wholly-owned subsidiary, Union, is its *alter ego*. The judge ignores Count XIV of the Geschkes' Complaint, which alleges that LaSalle Bancorp acquiesced to and participated in the fraud committed by Union. (Pet. pp. 39-40; Mot. pp. 23-24)

The judge also ignores the explicit finding of the court of appeals, in its March 9, 1992 Order reversing the summary judgment in favor of LaSalle Bancorp, that the Geschkes "also seek to pierce the corporate veil because, they allege, [LaSalle] Bancorp fraudulently

liquidated Union in order to make Union judgment-proof." (Pet. pg. 39)

The judge also misapplies Fed. Civ. Proc. Rule 50(a)(1). The Advisory Committee on Rules, in its Notes to the 1991 Amendment of Fed. Civ. Proc. Rule 50, observes that Fed. Civ. Proc. Rule 16 permits judges to order the presentation first at trial of "an issue that is likely to be dispositive . . . " The committee goes on to observe that "Such scheduling can be appropriate where the court is uncertain whether favorable action should be taken under Rule 56 ['Summary Judgment']." (Pet. pp. 40-41)

At the conclusion of the trial of the *alter ego* issue, the judge intends to consider a motion from LaSalle Bancorp for a judgment as a matter of law, pursuant to Rule 50(a)(1). However, the judge had already entered a

summary judgment in LaSalle Bancorp's favor in October 1990. That summary judgment was reversed by the court of appeals, whose March 9, 1992 Order terms the judge's summary judgment order "inappropriate." The order states that the Geschkes had identified "genuine issues of material fact." (Pet. pp. 41-42; Pet. App. pg. 48)

The judge's decision-making authority is limited to matters of law, not of fact. In view of the proceedings to date, in the Geschkes' case, with respect to the issue of LaSalle Bancorp's liability, the judge's consideration and entry of a judgment as a matter of law is an attempt to deny the Geschkes' right to due process and to have their case considered by a jury. (Pet. pg. 42; Mot. pp. 24-25)

The judge's intent to consider LaSalle Bancorp's motion for judgment as

a matter of law is still more distressing because, given the judge's demonstrated partiality for LaSalle Bancorp, there can be little doubt as to how he will rule.

Judge's Order Denying Motion For Recusal Misstates Facts And Ignores Other Facts And Arguments Set Forth In Motion

The judge's order is in the form of a three-page opinion. The judge in that opinion misstates facts and fails to address many facts and arguments set forth in the Geschkes' motion for his recusal. (Pet. App. p. 153-156) (see attached Appendix pp. 8-12)

The judge's assertion that his rulings in the Geschkes' case are "the principal grounds of complaint" is obviously incorrect. (Pet. pp. 43-44) (see attached Appendix pg. 11)

Contrary to the judge, although bias and prejudice may not be inferred merely from a judge's adverse rulings, a

particular ruling can in fact be evidence of an extrajudicial bias or prejudice. (Pet. pg. 44)

The judge does not deny the timeliness or sufficiency of the Geschkes' affidavit attached, as required by 28 U.S.C. § 144, to their motion for recusal. (Pet. pg. 45)

Neither Diamond, in his response to the motion for recusal, nor the judge, in his order denying the motion, chooses to or is able to address and explain away the facts the motion presents that indicate *ex parte* communication. (Nor did Diamond do so in LaSalle Bancorp's response to the Geschkes' petition for writ of mandamus for the judge's recusal.) The judge should have addressed in his Order the specific facts set forth in the motion for recusal. [See *Lamborn v. Dittmer*, 726 F.Supp. 510, 515-516 (S.D.N.Y. 1989)].

(Pet. pp. 44, 57)

The judge does not in any way address the facts and arguments, in the motion for recusal, concerning his refusal to take the Geschkes' case to trial, the unfairness of the evidentiary hearings, and the propriety of his order for the "*alter ego* issue" to be tried separately and ahead of the other issues in the case. (Pet. pg. 48)

The judge does not deny the truth of the facts presented in the affidavit. He does find that the facts offered as evidence in the motion for recusal would not convince a "reasonable person" that he was biased against the Geschkes. However, the judge merely states his conclusion without offering any discussion or evaluation of the truth or probative value of the evidence the Geschkes presented to show his bias and prejudice against them, and his

partiality for LaSalle Bancorp. He does not set forth any opposing facts that he believes argue against his recusal. (Pet. pg. 45)

The judge in his Order does not consider the application of 28 U.S.C. §§ 455(a) to the facts of the Geschkes' motion for recusal. Under § 455(a), judges must disqualify themselves from proceedings in which their "impartiality might reasonably be questioned." *Balistrieri v. United States*, *supra* at 1204-1205. He does not address the question of whether his actions might reasonably bring into question his impartiality, by giving the appearance of partiality, thereby requiring his disqualification under § 455(a). (Pet. pp. 47-48)

The judge asserts that the Geschkes are "judge shopping." To support that allegation, the judge cites a case

decided by the Court of Appeals for the Seventh Circuit in 1988. In that case, the court was asked to remove the *fourth* federal district judge to preside over that case in little more than a year. In contrast, Judge Grady has had control of the Geschkes' case for more than ten years without managing to take it to trial. Considerations of "judge shopping" hardly enter the picture in the Geschkes' motion for recusal. (Pet. pp. 46-47)

Geschkes Properly Filed With Court Of Appeals For The Seventh Circuit A *Petition For Writ Of Mandamus*

The judge had a duty to comply with federal rules, the law of the Geschkes' case, and the Constitution. "'Where the subject concerns the enforcement of the . . . rules which by law it is the duty of this court to formulate and put in force,' mandamus should issue to prevent such action thereunder so palpably

improper as to place it beyond the scope of the rule invoked." *LaBuy v. Howes Leather Co.* 256 [quoting *Los Angeles Brush Corp. v. James*, 272 U.S. 701, 706 (1927)]

Seventh Circuit case law provides that writs of mandamus are appropriate remedies when a district court judge refuses to recuse himself from a case when the statutory standard for recusal has been met. (Pet. pp. 3-4)

Supervisory control of the district courts by the courts of appeals is necessary to proper judicial administration of the federal system. The All Writs Act, 28 U.S.C. § 1651, gives courts of appeals discretionary power to issue writs of mandamus upon a showing of exceptional or extraordinary circumstances warranting mandamus. *LaBuy v. Howes Leather Co., supra* at 259-260.

The Geschkes' *Motion For Recusal* and *Petition For Writ Of Mandamus* showed the existence of exceptional or extraordinary circumstances warranting issuance of a writ of mandamus to the judge to recuse himself from their case. *Kerr v. United States District Court*, 426 U.S. 394 (1976), 48 L.Ed.2d 725, 732-733.

The Geschkes in their *Motion For Recusal* and *Petition For Writ Of Mandamus* met the burden of showing that they had a clear and indisputable right to a writ of mandamus to the judge to recuse himself. Both the motion for recusal and petition for mandamus satisfied the requirements of §§ 144, 455(a) and 455(b)(1), and established the judge's plainly defined and peremptory duty to recuse himself. *Will v. Calvert Fire Insurance Co., supra* at 511 [citing *Bankers Life & Casualty Co.*

v. Holland, 346 U.S. 379, 384, 98 L.Ed. 106, 74 S.Ct. 145 (1953); *Kerr v. United States District Court*, *supra* at 733; *Will v. United States*, 389 U.S. 90, at 95-96 (1967)]

The Geschkes had no other adequate means to obtain the judge's recusal from their case other than a writ of mandamus issued by the court of appeals. *Kerr v. United States District Court*, *supra* at 733.

Court Of Appeals' Sanctioning Actions Of District Court Judge Makes Appropriate Supreme Court's Exercise Of Supervisory Power

The court of appeals' denial, without opinion, of the Geschkes' petition for writ of mandamus and motion for recusal signifies its belief that no further comment was needed concerning the Geschkes' filings to obtain the judge's recusal.

The court of appeals' decision not

to issue an opinion left the judge's opinion as the only opinion issued in the proceedings concerning his recusal. The judge's opinion thus also became the court's opinion.

The court of appeals, despite the Geschkes' motion for reconsideration, evinced no concern about the judge's clearly erroneous statements in his opinion or about his failure to address facts and arguments in the Geschkes' motion for recusal.

The court of appeals, in denying the petition for writ of mandamus, sanctions the judge's departures from the accepted and usual course of judicial proceedings. And the court of appeals sanctions the judge's denial of the Gēschkes' Constitutional rights under the Fifth Amendment to due process and under the Seventh Amendment to a jury trial.

The orderly administration of justice in the federal courts is incompatible with Judge Grady's apparent bias and prejudice. Yet the court of appeals finds nothing troubling in the judge's failure over more than ten years to bring the Geschkes' fourteen-year-old case to trial. The court finds nothing worth comment in the facts that show *ex parte* communication, or at least the appearance thereof, between the judge and the defendants. The court finds nothing amiss in the judge's unfair and improper procedures for addressing the issue of LaSalle Bancorp's production of documents, and his failure to follow the federal rules and the law of the case.

The court of appeals does not even allow that the judge's actions have created the *appearance* of impartiality under § 455(a).

The Court of Appeals for the

Seventh Circuit has stated that the function of 28 U.S.C. § 455(a) is to ensure maintenance of public confidence in the integrity of the federal courts. [*United States v. Balistrieri*, *supra* at 1204-1205; *United States v. Murphy*, 768 F.2d 1518, 1539-1540 (7th Cir. 1985)] But the court fails to apply that principle to Judge Grady's bias and prejudice in the Geschkes' case. Public confidence in the integrity of the courts suffers when a judge in presiding over a case fails to properly discharge his duties and so clearly abuses his discretion.

The court of appeals ignores how the judge's failure, and in effect refusal, to take the Geschkes' case to trial frustrates and tends ultimately to defeat appellate review of proceedings at the district court level. *Will v. Calvert Insurance Co.*, *supra* at 511

(and previous decisions cited therein); *LaBuy v. Howes Leather Co.*, *supra* at 254.

The extraordinary nature of the judge's conduct in the Geschkes' case, and the completeness and thoroughness of the Geschkes' petition, argue that the facts merited the remedy of a writ of mandamus for his recusal. *Kerr v. United States District Court*, *supra* at 732-733 (and decisions cited therein).

Under the circumstances set forth in this petition for writ of certiorari, the court of appeals' denial of the Geschkes' petition for writ of mandamus merits the exercise of the Supreme Court's power of supervision. The Geschkes request the Court to grant their petition for writ of certiorari.

Respectfully submitted this 5th day of January 1994.

Irene M. Geschke, *Pro Se*

Clarence O. Geschke, *Pro Se*

January 5, 1994

Irene M. Geschke
Clarence O. Geschke
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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN CASE PRESENTED FOR REVIEW

The Geschkes' petition for writ of certiorari involves the following two constitutional provisions:

Amendment V (1791) --

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just

compensation."

Amendment VII (1791) --

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

The petition for certiorari also involves the following federal statutes:

28 U.S.C. § 144. Bias or prejudice of judge

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge

shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

28 U.S.C. § 455. Disqualification of justice, judge, or magistrate

"a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding

in which his impartiality might reasonably be questioned.

"(b) He shall also disqualify himself in the following circumstances:

"(1 Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;"

28 U.S.C. § 1651 Writs

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The petition involves the following federal civil procedure rule:

Rule 50. Judgment as a Matter of Law in Actions Tried by Jury; Alternative Motion for New Trial; Conditional Rulings

"(a) Judgment as a Matter of Law

"(1) If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, cross-claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.

"(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment."

The petition involves the following

federal rules of evidence:

Rule 602. Lack of Personal Knowledge

"A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses."

Rule 611. Mode and Order of Interrogation and Presentation

"(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion,

permit inquiry into additional matters as if on direct examination."

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge:	John F. Grady
Case Number:	79 B 40657
Case Title:	IN RE CLDC MANAGEMENT CORPORATION - Clarence O. Geschke et al, v. CLDC, et al
Date:	September 9, 1993

ENTER ORDER. Plaintiffs' motion for recusal is denied.

[For further detail see order attached to the original minute order form.].

September 9, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
	)	
CLDC MANAGEMENT CORP.	)	No. 79 B 40657
	)	
Debtor.	)	
	)	

	)	
CLARENCE O. GESCHKE	)	
	)	
and IRENE M.GESCHKE,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 80 A 103
	)	
CLDC MANAGEMENT CORP. UNION REALTY MORTGAGE COMPANY, INC., and JAMES CAMPION, as Trustee, et al.,	)	
Defendants	)	

ORDER

Plaintiffs have moved that I recuse myself from this case pursuant to 28 U.S.C. §§ 144 and 455 (a) and (b)(1). They argue that various rulings I have made indicate a personal bias against them and that the circumstances of one

ruling indicate that I have engaged in ex parte communications with the defendants.

Under § 144, statements of fact in an affidavit filed in support of a recusal motion must be taken as true, and the motion must be granted if those facts "would convince a reasonable person that bias exists." U. S. v. Balistrieri, 779 F.2d 1191, 1199 (7th Cir. 1985) (citation omitted). This does not mean, however, that conclusions or opinions contained in the affidavit must be assumed to be valid. Ibid. Moreover,

> [j]udges have an obligation to litigants and their collegues not to recuse themselves needlessly because a change of umpire in mid-contest may require a great deal of work to be redone . . . and facilitate judge-shopping.

Matter of Nat. Union Fire Ins. Co. of Pittsburgh, 839 F.2d 1226, 1229 (7th Cir. 1988) (citation omitted).

Assuming all of the facts alleged in plaintiffs' affidavit to be true, and giving their conclusions only such weight as is supported by the factual assertions, it is my belief that plaintiffs' affidavit would not persuade a reasonable person that I am biased against the plaintiffs. The fact that many ruling have gone against the plaintiffs does not show bias unless it is a fact that the rulings were clearly and consistently wrong. I believe the rulings were correct. A fair review of the transcripts relied upon [by] plaintiffs will indicate that I went to great lengths to see that they received the documents which are necessary to their case. (My rulings in regard to the matter of document production, and the related sanctions motions, are the principal grounds of complaint.) See generally the Order of April 14, 1993.

Plaintiffs' conclusion that I must have had ex parte communications with defendants or their counsel (recusal motion, ¶¶ 85-95) is mere surmise. It is not an inference justified by the facts they allege. I believe that a reasonable person reading the transcript of the October 15, 1992, hearing would not be persuaded that I had communicated with counsel in advance about what would be discussed at that hearing.

CONCLUSION

Plaintiffs' motion for recusal is denied.

DATED: September 9, 1993

ENTER: _____
John F. Grady,
United States District Judge

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

November 8, 1993

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

IN THE MATTER OF: CLARENCE O. GESCHKE and IRENE M. GESCHKE Petitioners	]	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 93-3289	]	No. 79 B. 40657
	]	John F. Grady, Judge

Upon consideration of the following:

1. PETITION FOR WRIT OF MANDAMUS filed 9/24/93 by the pro se petitioners;

2. RESPONDENTS LASALLE NATIONAL BANCORP, INC. AND UNION REALTY MORTGAGE CO. INC.'S ANSWER TO

PETITION FOR WRIT OF MANDAMUS filed 10/12/93 by counsel;

3. PETITIONERS' MOTION TO UPDATE PENDING PETITION FOR WRIT OF MANDAMUS filed 10/8/93 by the pro se petitioners;

4. CORRECTED PETITIONERS' MOTION FOR LEAVE TO FILE REPLY TO ANSWER FILED TO PETITION FOR WRIT OF MANDAMUS filed 10/21/93 by the pro se petitioners,

IT IS ORDERED that the PETITION FOR WRIT OF MANDAMUS is DENIED. The PETITIONERS' MOTION TO UPDATE PENDING PETITION FOR WRIT OF MANDAMUS and the CORRECTED PETITIONERS' MOTION FOR LEAVE TO FILE REPLY TO ANSWER FILED TO PETITION FOR WRIT OF MANDAMUS are DENIED as unnecessary. Respondents' request

for a regulatory injunction, contained in the ANSWER TO PETITION FOR WRIT OF MANDAMUS, is DENIED.

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge:	John F. Grady
Case Number:	79 B 40657
Case Title:	IN RE CLDC MANAGEMENT CORPORATION Clarence O. Geschke et al, v. CLDC, et al
Date:	November 24, 1993

The December 6, 1993 trial date is vacated.

[For further detail see order on the reverse of the original minute order form.]

ORDER

This court has just concluded a seven-week civil jury trial and must now proceed to trial in four criminal jury trials, consecutively, under the requirements of the Speedy Trial Act. The December 6, 1993, trial date in this

case must therefore be vacated. (The court would not proceed to trial in this case while the plaintiffs' motion for reconsideration of the denial of the mandamus petition is pending in any event.) This will be the first civil trial the court will hold after the last of the criminal cases approaching Speedy Trial Act deadlines has been concluded. The court's best estimate is that this will be around the first of March 1994.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

December 3, 1993

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

IN THE MATTER OF: CLARENCE O. GESCHKE and IRENE M. GESCHKE Petitioners	]	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 93-3289	]	No. 79 B. 40657
	]	John F. Grady, Judge

Upon consideration of the "MOTION FOR RECONSIDERATION OF PETITION FOR WRIT OF MANDAMUS" filed herein on 11/12/93,

IT IS ORDERED that the motion is DENIED.

FEB 4 1994
OFFICE OF THE CLERK

No. 93-1119

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CLARENCE O. GESCHKE and IRENE M. GESCHKE,
Petitioners,

v.

LASALLE NATIONAL BANCORP, INC.,
LASALLE NATIONAL BANK,
UNION REALTY MORTGAGE COMPANY, INC.,
CHICAGO TITLE & TRUST COMPANY, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CLARENCE O. GESCHKE and IRENE M. GESCHKE,

Petitioners,

v.

LASALLE NATIONAL BANCORP, INC.,
LASALLE NATIONAL BANK,
UNION REALTY MORTGAGE COMPANY, INC.,
CHICAGO TITLE & TRUST COMPANY, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents LaSalle National Bancorp, Inc., and Union Realty Mortgage Co., Inc.,[1] represent to the Court as follows:

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[1] The parent company of respondent LaSalle National Bancorp, Inc. is LaSalle National Corporation. The respondent Union Realty Mortgage Co., Inc. is a wholly owned subsidiary of respondent LaSalle National Bancorp, Inc. LaSalle National Corporation's parent is ABN AMRO, North America, Inc. The parent of ABN AMRO, North America, Inc. is ABN AMRO Bank, N.V. LaSalle National Bank is a party to the proceedings in this case solely by virtue of its formerly having been a trustee. LaSalle National Bank is a wholly owned subsidiary of LaSalle National Bancorp, Inc.

1. The petitioners, the Geschkes, claim their petition for a *writ of certiorari* should be granted because the Seventh Circuit Court of Appeals has sanctioned a departure by the district court which was "so far . . . from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."

2. The rulings which the petitioners allege support their position do not demonstrate any extraordinary departure from the accepted and usual course of judicial proceedings. The petitioners complain about two rulings. First, the district court's decision to conduct a bifurcated trial, trying first the issue of the alleged vicarious liability of one defendant, and then proceeding to try the liability of the other defendant for its alleged wrongful acts. Bifurcated trials are authorized by Federal Rule of Civil Procedure 42(b). The second complaint relates to the district court's ruling on discovery matters and the fact that the court held an evidentiary hearing to enable it to make its ruling. District courts rule daily on discovery matters and it is commonplace for them to hold evidentiary hearings in order to assist them in obtaining the facts necessary to make their rulings. The allegations of the petitioners only demonstrate that the district court has made procedural rulings, and that the appellate court refused to reverse the district court.

3. This civil cause has yet to be decided on the merits. Because the petitioners took issue with the rulings made by the district court, they filed a motion seeking to have the district court judge recuse himself, alleging that the basis for the district court's rulings was the judge's personal bias. The district court judge issued an order, which is contained in the appendix to the petition for *writ of certiorari*, setting forth the reasons for denial of the motion seeking his recusal.

4. The petitioners then filed a petition for writ of mandamus with the United States Court of Appeals for the Seventh Circuit, repeating the allegations made in their motion before the district court. The Seventh Circuit Court of Appeals, in an order dated November 8, 1993, denied the petition. The petitioners then sought a reconsideration by the Seventh Circuit Court of Appeals of its denial of their petition for a writ of mandamus. On December 3, 1993, the Seventh Circuit Court of Appeals denied the motion seeking reconsideration.

5. Mere error alone is not sufficient to invoke this Court's jurisdiction. The rulings are on procedural matters and the petitioner still will be afforded a decision on the merits. If an adverse decision on the merits is rendered by the district court, the petitioners can appeal on the merits.

THEREFORE, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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1994

CASE NO. 93-1119

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

IN RE: CLARENCE O. GESCHKE
and IRENE M. GESCHKE

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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and IRENE M. GESCHKE,
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Introduction

Petitioners *pro se* Clarence O. Geschke and Irene M. Geschke reply as follows to the *Brief In Opposition* filed by respondents LaSalle National Bancorp, Inc. and Union Realty Mortgage Company, Inc. (hereinafter, "the respondents"):

The Geschkes, in their *Petition For Writ Of Certiorari* (hereinafter, "Petition"), ask the Supreme Court of the United States to review and reverse an Order of the United States Court of Appeals for the Seventh Circuit. That order denied the Geschkes' *Petition For Writ Of Mandamus* to United States District Judge John F. Grady to recuse himself from the Geschkes' pending civil case 79 B 40657.

Petition For Writ Of Certiorari Argues That Judge Has Denied Due Process And A Jury Trial, And Is Biased And Prejudiced

The respondents, in their *Brief In*

Opposition (hereinafter, "Brief"), begin by quoting part of Supreme Court Rule 10.1(a), which they assert is the Geschkes' argument for granting their Petition. (see Brief, pg. 2 par. 1)

However, contrary to the respondents, the Geschkes in their Petition present the following three questions for this Court's review.

(1) "Whether, in a fourteen-year-old case that the district court judge has never brought to trial, the judge's actions have departed from the accepted and usual course of judicial proceedings by denying the petitioners' rights under the United States Constitution and by not acting in accordance with federal rules and case law."

(2) "Whether the district court judge's actions indicate that he

harbors bias and prejudice against the petitioners."

(3) "Whether the Court of Appeals for the Seventh Circuit erred in denying the petitioners' *Petition For Writ Of Mandamus* to the district court judge to recuse himself from the case, and thereby sanctioned the judge's actions and his bias, prejudice and partiality."

(see Petition, pg. iii)

Petition For Writ Of Certiorari Is Not Grounded On The Judge's Rulings

The respondents state, erroneously, that the Geschkes' Petition is grounded solely on the judge's rulings. (see Brief, pg. 2 par. 2) Even a cursory review of the Petition would make the respondents well aware it is not grounded on the judge's rulings. The Petition presents four separate grounds

to support its arguments that the answer to all the above three questions presented for review is "Yes." Those four grounds are:

(1) the judge's failure to take this fourteen-year-old case to trial although he has presided over the case since April 1983 (see Petition pp. 18-19, 34-39, 53);

(2) the judge's *ex parte* communication with the respondents' legal counsel (see Petition pp. 19-20, 39-43, 52);

(3) the judge's adoption of unfair and improper procedures that favored the respondents, to the Geschkes' detriment (see Petition pp. 10-14, 21-30, 43-47, 53);

(4) the judge's failure to comply with federal rules of civil procedure and the law of the

case (see Petition pp. 30-32, 47-51, 53).

The Petition argues that the four grounds show that the judge is biased and prejudiced against the Geschkes and their cause and is partial to the defendants.

The Petition argues that those grounds show that the judge has denied the Geschkes their Constitutional rights to due process and to a trial before a jury. (see Petition, pp. 33, 37-38) [Contrary to the respondents (Brief, pg. 3 par. 5), the Geschkes have secured a jury trial and, barring the judge's issuance of a judgment as a matter of law in favor of the defendants, the decision will be rendered by a jury.]

The Petition argues that the four grounds show that the judge has departed from the accepted and usual course of judicial proceedings. (see Petition, pp.

32-33)

Respondents Fail To Address Arguments, And Grounds Supporting Those Arguments, Presented In Petition For Certiorari

The respondents in their Brief do not address in any way the judge's failure to take case 79 B 40657 to trial and his *ex parte* communication with them.

Nor do the respondents address the Petition's arguments concerning the judge's adoption of unfair and improper procedures (see Petition, pp. 10-14, 21-30, 43-47, 53) and his failure to follow federal rules and the law of the case. (see Petition, pp. 30-32, 47-51, 53)

Contrary to the respondents (Brief, pg. 2, par. 2), the judge is not conducting a bifurcated trial as authorized by Federal Civil Procedure Rule 42(b) "Separate Trials." The judge has stated his intention to conduct not separate trials but *one trial in two*

parts. [see Petition, pp. 30-31, 49 (and, in particular, the reference on pg. 49 to the *Petition For Writ Of Mandamus*, pp. 40-41)]

The Petition notes that the judge, in his Order denying the Geschkes' motion for his recusal, either misstated or did not address the arguments presented therein. (see Petition pg. 51) The respondents do not defend the one opinion issued in the proceedings to obtain the judge's recusal. (see Petition, pp. 51-55)

Nor do the respondents address the Court of Appeals' failure to adhere to its own rulings, and the implications of that court's denial of the Geschkes' *Petition For Writ Of Mandamus*. (see Petition, pp. 55-62)

Conclusion

The respondents in their Brief rely on misrepresentation to mislead this

Court concerning the grounds on which the Geschkes base the arguments in their Petition.

The Petition's arguments in support of a writ of certiorari are not grounded on the judge's rulings or on any "mere error" on his part.

The grounds the Petition presents -- the unheard-of delay in taking a fourteen-year-old federal case to trial, *ex parte* communication between the judge and the defendants, the unfair and biased manner in which the judge conducted evidentiary hearings, the judge's disregard of federal procedural rules and the law of the case -- constitute an extraordinary departure from the accepted and usual course of judicial proceedings.

The judge's actions in case 79 B 40657 have also tended to defeat ultimate appellate review of the case.

The Court of Appeals, by denying the Geschkes' petition for writ of mandamus, has sanctioned by judge's actions. Review by the Supreme Court is therefore appropriate and merited.

The Geschkes ask this Court to grant their *Petition For Writ of Certiorari*.

Respectfully submitted this 7th day of February 1994.

Irene M. Geschke, *Pro Se*

Clarence O. Geschke, *Pro Se*

February 7, 1994

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